

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HEDELITO TRINIDAD y GARCIA,) No. CV 08-07719-MMM(CW)
)
Petitioner,) [PROPOSED]
) ORDER GRANTING PETITION
v.) FOR WRIT OF HABEAS CORPUS
)
MICHAEL BENOV (Warden),)
)
Respondent.)
-----)

The petition for writ of habeas corpus is **GRANTED** for the reasons and on the conditions stated below.

BACKGROUND AND PROCEEDINGS

Petitioner Hedelito Trinidad y Garcia challenges the legality of his federal custody pending extradition to the Philippines. The present action is the third of three related cases in this court, namely, an extradition proceeding and two habeas petitions.¹

¹ This background information is taken from the Report and Recommendation (docket no. 39) filed February 13, 2009, which contains a detailed discussion of the extradition process and the proceedings and issues in Petitioner's three cases, along with citations to the records and to legal authorities.

1 The extradition proceeding was initiated on December 18, 2003,
2 when the United States Attorney filed a complaint seeking Petitioner's
3 extradition to the Philippines on a charge of kidnaping for ransom and
4 the court issued a bench warrant. [See United States v. Trinidad,
5 Case No. M 03-2710.] Petitioner was arraigned in this court on
6 October 8, 2004, and the federal public defender was appointed to
7 represent him. On December 10, 2004, the case was re-docketed as
8 Extradition of Trinidad, No. CV 04-10097-MMM(CW), and a formal request
9 for extradition was filed. The matter was briefed extensively, and
10 the magistrate judge held an evidentiary hearing (on May 19 and 24,
11 2005, with closing arguments on August 25, 2005).²

12 In the extradition proceeding it was undisputed that this court
13 had jurisdiction, that a valid treaty was in force, and that the
14 charged offense was covered by the treaty. The parties disputed
15 whether there was probable cause to believe Petitioner committed the
16 charged offense. Petitioner also argued for denial of certification
17 on humanitarian grounds under the United Nations Convention Against
18 Torture (the "Torture Convention"). The magistrate judge found that,
19 in an extradition proceeding, the court had no authority to deny
20 certification on such grounds, and that such a claim was not ripe for
21 judicial review unless and until the Secretary of State made a final
22 decision to extradite Petitioner.

23

24 ² Extradition proceedings are usually brought before magistrate
25 judges. The magistrate judge's role is to determine whether the
26 charged offense is extraditable under the relevant treaty, and whether
27 there is probable cause to sustain the charge against the person in
28 question. On making such determinations, the magistrate judge is
required to certify the person as extraditable to the Secretary of
State. See Vo v. Benov, 447 F.3d 1235, 1237 (9th Cir. 2006);
Prasoprat v. Benov, 421 F.3d 1009, 1012 (9th Cir. 2005).

1 After considering evidentiary issues, the magistrate judge
2 concluded that the minimum standard of probable cause had been met.
3 The magistrate judge's Certification of Extraditability was filed
4 September 7, 2007. In an order filed September 18, 2007, the
5 magistrate judge stayed extradition until completion of habeas corpus
6 proceedings in the district court.³

7 On October 5, 2007, Petitioner filed a petition for writ of
8 habeas corpus under 28 U.S.C. § 2241, which was docketed as No. CV 07-
9 6387-MMM. Petitioner challenged the certification, contending that
10 the magistrate judge erred in admitting supplemental evidence; that,
11 even with the supplemental evidence, the probable cause finding was
12 not supported; and that, even if a probable cause finding was
13 supported, Petitioner's extradition would violate federal law and the
14 Torture Convention.

15 On December 20, 2007, Petitioner moved to stay the first habeas
16 proceeding until the Secretary of State had reviewed his Torture
17 Convention claim. In an order filed March 3, 2008, the court denied
18 the motion to stay, finding that a Torture Convention claim would only
19 be ripe for judicial review if the Secretary decided to extradite
20 Petitioner, and that Petitioner could seek a stay of extradition, if
21 necessary, once the district court decided the habeas petition. On
22 April 15, 2008, Petitioner moved for reconsideration of the order
23 denying a stay. In an order filed May 13, 2008, the court denied the
24

25 ³ A magistrate judge's certification of a person as extraditable
26 is not directly appealable but may be challenged in a habeas petition
27 filed as a new action in the district court. Vo, 447 F.3d at 1240.
28 The district court's habeas review of a magistrate judge's extradition
order is limited to whether the magistrate had jurisdiction, whether a
treaty in force covered the charged offense, and whether competent
evidence supported a finding of probable cause. Vo, 447 F.3d at 1240.

1 motion, again finding the Torture Convention claim not ripe for review
 2 unless and until the Secretary decided to extradite Petitioner.

3 In an order filed July 16, 2008, the court denied Petitioner's
 4 first habeas petition, rejecting the evidentiary arguments and
 5 affirming the probable cause finding. The court also found, again,
 6 that the Torture Convention claim, if reviewable, would not be ripe
 7 until the Secretary had made a final decision to surrender Petitioner
 8 for extradition, and denied the first habeas petition without
 9 prejudice to asserting a Torture Convention claim in a second
 10 petition. On July 24, 2008, Petitioner waived his right to appeal the
 11 district court decision in the first habeas proceeding. On September
 12 12, 2008, the Secretary of State issued a warrant to surrender
 13 Petitioner for extradition.⁴ Petitioner then filed a request to stay
 14 extradition pending resolution of a second habeas petition. In orders
 15 filed September 29, 2008, the court granted the stay.

16 The present, second habeas proceeding was opened on November 24,
 17 2008, as a petition for writ of habeas corpus under 28 U.S.C. § 2241,
 18 docketed as No. CV 08-7719-MMM(CW). (Petitioner's second habeas
 19 petition and other documents were originally filed in Case No. CV 07-
 20 6387, and were re-docketed under the new case number.) The second
 21 habeas petition challenges Petitioner's custody pending extradition to
 22 the Philippines under the Secretary of State's surrender warrant
 23 issued September 12, 2008. Petitioner contends that his extradition
 24 would violate the Torture Convention and federal law because there are
 25

26 ⁴ If a person has been judicially certified as extraditable, the
 27 Secretary of State then decides whether to surrender that person to
 28 the foreign state. Vo, 447 F.3d at 1237. The Secretary may decide to
 extradite, not to extradite, or to extradite with conditions. See,
e.g., United States v. Kin Hong, 110 F.3d 103, 109-10 (1st Cir. 1997).

1 substantial grounds to believe that he would be tortured if returned
 2 to the Philippines. Petitioner claims that the Secretary's decision
 3 to extradite him, in spite of his Torture Convention claim, was
 4 arbitrary in violation of the Administrative Procedure Act ("APA"), 5
 5 U.S.C. § 551 et seq.⁵

6 Respondent filed an application to dismiss the second petition
 7 for lack of jurisdiction, which the parties fully briefed. In the
 8 February 13, 2009 Report and Recommendation, the magistrate judge
 9 recommended that the application to dismiss the petition be denied and
 10 that respondent be ordered to answer Petitioner's APA claim on its
 11 merits. Respondent filed objections (docket no. 40), and a notice of
 12 supplemental authority (docket no. 47) to which Petitioner filed a
 13 response (docket no. 48). In an order filed May 15, 2009 (docket no.
 14 46), the court adopted the Report and Recommendation, denied the
 15 motion to dismiss, ordered Respondent to file an answer addressing
 16 Petitioner's APA claim on its merits, directed Respondent to submit
 17 evidence from the administrative record (sufficient to enable the
 18 court to determine whether the Secretary acted arbitrarily,
 19 capriciously, in abuse of discretion, or in violation of law in
 20 deciding to extradite Petitioner), and stated that Respondent might
 21 raise any issues about the protection of confidential materials.

22 On June 12, 2009, Respondent filed an application to certify the
 23 court's order for interlocutory appeal (docket no. 50). In a minute
 24 order filed July 20, 2009 (docket no. 57), the court denied this
 25 application and again ordered Respondent to file an answer and submit
 26

27 ⁵ Petitioner also claims that the Secretary's decision denied
 28 him procedural and substantive due process under the Fifth Amendment,
 but the court has not reached, and need not reach, those claims.

1 evidence. In a notice of non-compliance filed August 3, 2009 (docket
2 no. 58), Respondent reasserted the position that this court lacks
3 jurisdiction to review the Secretary of State's final extradition
4 decision, and respectfully declined to produce further evidence as
5 ordered by the court.

6 In a motion filed August 4, 2009 (docket no. 4), Respondent made
7 an anticipatory application for a detention hearing for Petitioner,
8 and sought an order staying release. In a minute order filed August
9 28, 2009 (docket no. 63), the magistrate judge denied the application,
10 without prejudice, as premature, stating that Petitioner was in
11 custody, that the court had not ordered him released, and that, if the
12 court issued the writ, the parties would then have an opportunity to
13 litigate the issue of Petitioner's release or detention pending
14 appeal.

15 At a status conference on September 4, 2009, counsel confirmed
16 that the Government anticipates that the writ will be granted, intends
17 to appeal on the issue of jurisdiction, and intends to ask the court
18 to order that Petitioner remain in custody while the appeal is
19 pending, and that Petitioner also anticipates that the writ will be
20 granted, and intends to seek release on conditions pending appeal.

21 [See minute order filed September 4, 2009, docket no. 64.] To
22 expedite proceedings, counsel agreed that counsel would waive the
23 opportunity to file objections to a second report and recommendation;
24 that Magistrate Judge Woehrle would submit this matter to Judge Morrow
25 for decision by presented order rather than report and recommendation;
26 that the presented order would be lodged and served on the parties;
27 and that, after the filing of this order, the court would hold a
28 hearing on issues raised in Respondent's "anticipatory application"

1 (docket no. 59). Since then, Petitioner has filed opposition to
 2 Respondent's application for continued detention (docket no. 66), and
 3 Respondent has filed a reply (docket no. 67).

4 **THE TORTURE CONVENTION**

5 The Torture Convention was adopted by the United Nations General
 6 Assembly in 1984, and entered into force as to the United States in
 7 1994. See Cornejo-Barreto v. Seifert ("Cornejo-Barreto I"), 218 F.3d
 8 1004, 1007 and n.1 (9th Cir. 2000). Article 3 of the Torture
 9 Convention provides that "[n]o State Party shall . . . extradite a
 10 person to another State where there are substantial grounds for
 11 believing that he would be in danger of being subjected to torture."
 12 Quoted in Cornejo-Barreto I, 218 F.3d at 1011. Article 3 of the
 13 Torture Convention was implemented by Congress in 1998 in section 2242
 14 of the "FARR Act," which stated that it was United States policy not
 15 to extradite any person to a country where there were substantial
 16 grounds for believing that person would be in danger of being
 17 tortured, and called for the adoption of regulations to implement that
 18 policy.⁶ The State Department adopted regulations implementing
 19 section 2242 of the FARR Act and defining the Secretary of State's
 20 duties under Article 3 of the Torture Convention in regard to
 21 extradition. These regulations provide, in part, as follows:

22 [T]he Secretary [of State] is the U.S. official
 23 responsible for determining whether to surrender a fugitive
 24 to a foreign country by means of extradition. In order to
 25 implement the obligation assumed by the United States

27 ⁶ The FARR Act is the Foreign Affairs Reform and Restructuring
 28 Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681. Section 2242 of the
 FARR Act was codified in a note to 8 U.S.C. § 1231.

1 pursuant to Article 3 of the [Torture] Convention, the
2 Department considers the question of whether a person facing
3 extradition from the U.S. "is more likely than not" to be
4 tortured in the State requesting extradition when
5 appropriate in making this determination.

6 Decisions on extradition are presented to the Secretary
7 only after a fugitive has been found extraditable by a
8 United States judicial officer. In each case where
9 allegations relating to torture are made or the issue is
10 otherwise brought to the Department's attention, appropriate
11 policy and legal offices review and analyze information
12 relevant to the case in preparing a recommendation to the
13 Secretary as to whether or not to sign the surrender
14 warrant.

15 Based on the resulting analysis of relevant
16 information, the Secretary may decide to surrender the
17 fugitive to the requesting State, to deny surrender of the
18 fugitive, or to surrender the fugitive subject to
19 conditions.

20 22 C.F.R. §§ 95.2-95.3 (2000)(quoted in Cornejo-Barreto I, 218 F.3d at
21 1011-12).

22 **THE JURISDICTIONAL ISSUE**

23 As discussed at length in the Report and Recommendation cited
24 above, this court's determination that it has jurisdiction to review
25 Petitioner's Torture Convention claim is controlled by the Ninth
26 Circuit's decision in Cornejo-Barreto I. In Cornejo-Barreto I, as
27 understood by this court, the Ninth Circuit held that a fugitive
28 fearing torture if extradited may bring a claim in a habeas petition

1 under 28 U.S.C. § 2241, that such a claim would only be ripe if and
2 when the Secretary of State makes a final decision to surrender the
3 fugitive for extradition, and that a district court would then have
4 jurisdiction to review such a claim. Cornejo-Barreto I, 218 F.3d at
5 1012-13. The Ninth Circuit summarized its conclusions as follows:

6 The individual's right to be free from torture is an
7 international standard of the highest order. Indeed, it is
8 a jus cogens norm [footnote omitted]: the prohibition
9 against torture may never be abrogated or derogated.

10 [footnote omitted] We must therefore construe Congressional
11 enactments consistent with this prohibition. In the
12 extradition context, the approach we describe here allows us
13 to give full effect to Congressional legislation without
14 creating a conflict between domestic and international law.
15 We recognize that Congress intended the Secretary of State
16 to act as the "competent authority" charged with enforcing
17 Article 3 of the Convention. We also recognize that
18 Congress did not limit judicial review of the Secretary's
19 decisions under long-standing APA procedures. An extraditee
20 ordered extradited by the Secretary of State who fears
21 torture upon surrender, therefore, may state a claim
22 cognizable under the APA that the Secretary of State has
23 breached her duty, imposed by the FARR Act, to implement
24 Article 3 of the Torture Convention. Such a claim, brought
25 in a petition for habeas corpus, becomes ripe as soon as the
26 Secretary of State determines that the fugitive is to be
27 surrendered to the requesting government.

28 Id. at 1016-17.

In applying to dismiss the present petition for lack of jurisdiction, Respondent raised five arguments applicable to the APA claim: that district court review of Torture Convention claims is barred by the "REAL ID Act"⁷; that judicial review of the Secretary's final extradition decisions is precluded by the "Rule of Non-Inquiry" as reaffirmed in Munaf v. Geren, ___ U.S. ___, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008); that neither the Torture Convention nor the FARR Act overturned the Rule of Non-Inquiry; that the APA does not support judicial review of the Secretary's decisions; and that the suggestion in Cornejo-Barreto I that the Secretary's decisions are reviewable amounts to non-binding dicta. These arguments were rejected after lengthy discussion in the February 13, 2009 Report and Recommendation. That determination was adopted by the court's May 15, 2009 Order, which also rejected further arguments raised in Respondent's objections. That order and the discussion in the Report and Recommendation are incorporated in this order. In rejecting Respondent's jurisdictional challenge, this court has relied on and continues to rely on its reading of the holding in Cornejo-Barreto I and its understanding that this holding remains the law of this circuit and is binding on this court.

PETITIONER'S APA CLAIM

22 The Cornejo-Barreto I Panel did not decide a claim under the
23 Torture Convention and the APA, nor did it determine the evidence
24 needed or the standard to be applied in reaching such a decision;
25 instead, it simply held that a petitioner could obtain judicial review
26 of such a claim once it became ripe.

⁷ See the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

1 In Petitioner's case, it is undisputed that he presented a
2 Torture Convention claim to the Secretary of State, that he was
3 entitled to the Secretary's review of that claim (pursuant to the
4 Torture Convention, the FARR Act, and the implementing regulations),
5 and that, in issuing a surrender warrant, the Secretary rejected his
6 Torture Convention claim. In the present action, Petitioner has
7 presented to this court a non-frivolous claim for habeas corpus
8 relief, contending that his custody pursuant to the surrender warrant
9 is illegal because the Secretary's denial of his Torture Convention
10 claim was arbitrary under the APA.⁸

11 As noted above, this court has held that Petitioner's Torture
12 Convention claim is now ripe, and that this court has jurisdiction to
13 review it under the APA. In its May 15, 2009 Order, the court ordered
14 Respondent to answer Petitioner's APA claim on its merits and to
15 submit evidence from the administrative record sufficient to enable
16 the court to determine whether the Secretary acted arbitrarily in
17 deciding to extradite Petitioner, while stating that Respondent might
18 raise any issues about protection of confidential materials. Having
19 unsuccessfully sought reconsideration or immediate appeal on the
20 jurisdictional issue, Respondent then declined to comply with this
21 court's orders on further proceedings. Accordingly, the court must
22 now decide this claim under the APA, without Respondent's assistance.

23 Under the APA, a reviewing court must hold unlawful and set aside
24 an agency action that is "arbitrary, capricious, an abuse of
25 discretion, or otherwise not in accordance with law." Crickon v.
26

27 ⁸ Petitioner's claim that he fears being subjected to torture if
28 extradited is supported by evidence that several of his co-defendants
were subjected to torture while in custody in the Philippines.

1 Thomas, 579 F.3d 978, 982 (9th Cir. 2009)(quoting 5 U.S.C. § 706(2)
2 (A). However, review is "highly deferential, presuming the agency
3 action to be valid and affirming the agency action if a reasonable
4 basis exists for its decision." Crickon, 579 F.3d at 982 (quoting
5 Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service, 475
6 F.3d 1136, 1140 (9th Cir. 2007)(citation and internal quotation marks
7 omitted)). "A reasonable basis exists where the agency considered the
8 relevant factors and articulated a rational connection between the
9 facts found and the choices made." Crickon, 579 F.3d at 982 (quoting
10 Arrington v. Daniels, 516 F.3d 1106, 1112 (9th Cir. 2008)(citation and
11 internal quotation marks omitted)).

12 A court reviewing an agency decision considers the administrative
13 record as a whole, "weighing both the evidence that supports and the
14 evidence that detracts from the [agency's] conclusion." Lingenfelter
15 v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). The reviewing court
16 may set aside an agency decision that is "unsupported by substantial
17 evidence." Robert F. Kennedy Medical Center v. Leavitt, 526 F.3d 557,
18 561 (9th Cir. 2008) (quoting 5 U.S.C. § 706(2)(E)).⁹ However, a court
19 must review an agency decision based solely on the administrative
20 record "and determine whether the agency has articulated a rational
21 basis for its decision." Crickon, 579 F.3d at 982 (quoting Tablada v.
22 Thomas, 533 F.3d 800, 805 (9th Cir. 2008)). The court may not attempt
23 itself to make up for deficiencies in the record. Crickon, id.
24 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut.

⁹ "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 149, 117 S. Ct. 1953, 138 L. Ed. 2d 327 (1997) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938)).

Auto. Ins., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)). Thus, the reviewing court may "not supply a reasoned basis for the agency's action that the agency itself has not given." Crickon, id. (citing Motor Vehicle Mfrs. Ass'n, id.). Nor should the reviewing court "infer an agency's reasoning from mere silence." Crickon, id. (quoting Arrington, 516 F.3d at 1112).

In Petitioner's case, Respondent has refused to provide the administrative record on which the Secretary relied in making her final decision.¹⁰ Because of Respondent's refusal to comply with court orders, the court has no administrative record to review, no evidence to weigh, and no grounds for finding that the Secretary's decision was supported by substantial evidence. Respondent has refused to provide any relevant evidence from which this court could find that "the agency has articulated a rational basis for its decision." Crickon, 579 F.3d at 982. As noted above, this court may not attempt itself to make up for this deficiency by supplying "a reasoned basis for the agency's action that the agency itself has not given," and may not "infer an agency's reasoning from mere silence."

¹⁰ Petitioner contended in the Traverse (docket no. 62) that this court may presume that Petitioner's record in this court was incorporated in the administrative record. However, this court has no evidence as how the court record figured into the administrative process after Petitioner was certified as extraditable. The only evidence on this question yet supplied by Respondent consists of declarations attesting to procedures the State Department generally follows in deciding whether to surrender a fugitive, certified as extraditable, who states a claim under the Torture Convention. See, e.g., Declaration of Clifton M. Johnson, exhibit to Respondent's opposition to Petitioner's bail motion (docket no. 33, filed January 5, 2009). However, this evidence does not establish what the Secretary's decision in this specific case was based on, or whether that decision was arbitrary, which are the points at issue in the present action.

1 decision for which no rationale has been offered is, per se,
2 arbitrary, and is not entitled to any deference. See Crickon, 579
3 F.3d at 983 ("'[t]he agency's lack of explanation for its choice
4 renders its decision arbitrary and capricious'"')(quoting Arrington,
5 516 F.3d at 1112).

6 **ORDERS**

7 It is therefore **ORDERED** as follows:

8 1. The petition for writ of habeas corpus is granted.

9 2. Petitioner is ordered released from custody imposed pursuant
10 to the Secretary's surrender warrant.

11 3. Judgment shall be entered accordingly.

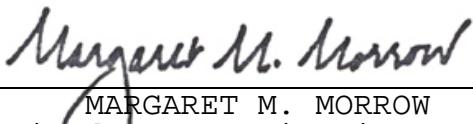
12 4. The order releasing Petitioner from custody is stayed, for a
13 period of sixty days, or such shorter time as is needed, for
14 resolution of Respondent's application for Petitioner's continued
15 detention pending appeal of this decision.

16
17 DATED: November 17, 2009

18
19 Presented by

20 Dated: October 16, 2009

22 /S/
23 CARLA M. WOEHRLE
United States Magistrate Judge



MARGARET M. MORROW
United States District Judge